IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

STATE OF TENNESSEE v. ROBERT BRADLEY SPIVEY

Direct Appeal from the Criminal Court for Cumberland County
No. 8980 David A. Patterson, Judge

No. E2007-00994-CCA-R3-CD - Filed July 15, 2008

After a bench trial, the Defendant was convicted of: Driving Under the Influence ("DUI"), third offense; possession of a prohibited weapon; and driving on a revoked license. The trial court sentenced the Defendant to an effective sentence of eleven months and twenty-nine days to be served in jail. On appeal, the Defendant contends that: (1) the evidence is insufficient to sustain his DUI conviction; and (2) the trial court erred when sentencing him. Finding no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

John B. Nisbet, III, (on appeal) and Joe L. Finley (at trial), Cookeville, Tennessee, for the Appellant, Robert Bradley Spivey.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Deshea Dulany, Assistant Attorney General; William E. Gibson, District Attorney General; Mark E. Gore, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

The Cumberland County Grand Jury indicted the Defendant for DUI, third offense, violation of the implied consent law, driving on a revoked license, second offense, and possession of a prohibited weapon. The Defendant waived his right to a jury trial, and the trial court conducted a bench trial. At that trial, the following evidence was presented: Deputy J. E. Stover, with the Cumberland County Sheriff's Department, testified that he was called to a traffic accident on September 3, 2005. When he arrived, he noticed a vehicle that had struck an embankment, and there was a person, whom he later identified as Ralph Spivey, the Defendant's relative, "hanging out" of the passenger side of the car with his chin resting on the top of the car. The deputy said he saw the Defendant in the center of the roadway.

Deputy Stover testified he immediately exited his car and noticed that the Defendant was unsteady on his feet. He thought the Defendant may have been injured in the accident, and, as he walked toward the Defendant, Deputy Stover saw a beer can in the Defendant's back left pocket. The deputy asked if the Defendant was okay, and the Defendant responded that he was fine. The deputy immediately left to check on Ralph Spivey because he looked "deathly ill," but he found that Ralph was only "passed out" and "vomiting down the side . . . of the truck . . . ."

Other officers soon arrived, and Deputy Stover asked them to attend to Ralph while the deputy interviewed the Defendant. The deputy explained that the location where the accident occurred had a severe embankment on the right side of the road, if traveling in the same direction as the Defendant. When the deputy asked the Defendant what had happened, the Defendant told the deputy that he was driving down the hill when the "steering broke" on his vehicle. Deputy Stover began to suspect that the Defendant was intoxicated, and he asked the Defendant for his license.

While Deputy Stover checked the Defendant's license, Deputy Danny Stone conducted field sobriety tests on the Defendant. Deputy Stover watched the tests from a distance. The deputy opined that the Defendant was "extremely intoxicated" and had driven while in that state. Deputy Stover said the check of the Defendant's license revealed that he was driving on a revoked license, and the officers decided to place the Defendant under arrest. When conducting a pat-down search pursuant to the arrest, the officers found brass knuckles in the Defendant's left rear pocket.

On cross-examination, the deputy agreed that his arrest report said the Defendant admitted that he left the County Line Bar after drinking. He agreed that the report did not specifically say that the Defendant said he was driving when he left the bar. On redirect examination, the deputy testified that he and another officer had to physically remove Ralph Spivey from the truck because Spivey was "borderline passed out." The officer said there was no one else at the scene. On recross-examination, the officer estimated that twenty minutes elapsed between the time that the call reporting the accident was received by the sheriff's office and the time that he arrived at the scene.

Deputy Danny Stone of Cumberland County Sheriff's Department testified that, on September 3, 2005, he responded to the scene of this accident, and he arrived shortly after Deputy Stover. Upon Deputy Stone's arrival, he noticed that Deputy Stover was speaking with

the Defendant, and the Defendant's truck was in a ditch. Deputy Stone testified that he knew the Defendant, and the Defendant came to speak with him. The Defendant told the deputy that the Defendant and Ralph had been at the County Line Bar, and he was driving Ralph home because Ralph had consumed too much alcohol. Deputy Stone noticed the Defendant was unsteady on his feet and asked the Defendant how much alcohol he had consumed, and the Defendant said "a couple of beers." The Defendant consented to performing field sobriety tasks, upon which he performed poorly. Subsequently, the Defendant was arrested. The Defendant, at some point, changed his story and said that he had not been driving when the truck wrecked. Deputy Stone said that the only other person at the scene of the wreck was Spivey, who was vomiting outside the passenger's door of the vehicle. The deputy said that it was readily apparent that Spivey was intoxicated.

Deputy Stone described the field sobriety tasks that he asked the Defendant to perform. He said that he asked the Defendant to say the "ABC's," and the Defendant was unable to complete the alphabet. The deputy also asked the Defendant to perform a finger count test in which he asked the Defendant to take his thumb and touch it to each of his fingers, counting "one, two, three, four" and then back "four, three, two, one." The Defendant again performed poorly on this task. Finally, the deputy asked the Defendant to touch his finger to his nose, and the Defendant attempted this task but performed poorly.

Deputy Stone testified that he attempted to record all of these field sobriety tests with the camera installed in his police car. Unfortunately, the camera did not operate properly, and the tests were not recorded. Deputy Stone opined that the Defendant was intoxicated. Therefore, he arrested the Defendant. Pursuant to a pat-down search, the officer found some brass knuckles in the Defendant's back pocket. The deputy transported the Defendant to the justice center and asked the Defendant to take a breathalyzer test. The Defendant refused. The Defendant was read and signed an implied consent form.

On cross-examination, Deputy Stone testified that the tape recording had no sound and did not capture the field sobriety tests. He agreed that the video tape did not depict the Defendant stumbling. Deputy Stone agreed that he was not at the scene of the accident when it occurred, and he did not know what happened before he arrived.

A certified copy of the Defendant's driving record was entered into evidence, and the State rested.

For the Defendant, Pencie Smith testified that she had been to the County Line Bar one time, on the night of this accident, and she saw the Defendant there. When she left the bar, she saw the Defendant passed out in the passenger's side of his truck. She saw a blonde woman driving the truck away from the bar. On cross-examination, Smith testified that the Defendant was drinking while inside the bar, as was the blonde woman that she later saw driving the Defendant's truck.

Ella Stoner, Smith's aunt, testified that she picked up Smith from the County Line Bar on September 3, 2005. She said that she saw a blonde woman walk out of the bar after Smith. The

woman got into a truck parked near Stoner, started the truck and backed out of the parking space. Stoner said that the Defendant was also in the truck with the woman. Stoner explained on cross-examination that she knew the Defendant because she was a friend if the Defendant's aunt. Stoner said that she went to pick up Smith at around 3:00 a.m.

The Defendant testified that he went to the County Line Bar with his cousin, Ralph Spivey, on the night of this accident. He said that the blonde woman who drove his truck was one of Ralph's "so-called girlfriends," and he had never seen her before that evening. The Defendant said that he was passed out in the passenger's side seat of his truck and did not awaken until after his truck had wrecked. He said that, when he awoke, Ralph, who had been on the mattress in the camper of the truck, was lying in the road. The Defendant got him and placed him in the passenger's seat. The Defendant planned to go to Ralph's mother's house to get help. The Defendant said that the truck belonged to Ralph and that it was registered in Ralph's name. The Defendant denied ever telling officers that he had driven the truck. Further, he said he was not coordinated and could not successfully perform field sobriety tasks even sober. The Defendant said that he spoke with the blonde woman at the bar, but he did not know her. She had flirted with multiple men at the bar and had danced with Ralph.

On cross-examination, the Defendant said that he bought more beer at 2:30 a.m. and placed it in the truck. He drank one and took some Xanax and then passed out in the passenger's seat of his truck. The Defendant did not know whether the truck was driven or pulled into the ditch where it was found. The Defendant said that Ralph was not present to testify because Ralph was too intoxicated to remember anything. The Defendant said that he made a joke while attempting to complete the ABC field sobriety test, by omitting the "P" and telling the officer that it was running down his leg. He said that he did not, at the time, realize that he was being investigated for DUI. The Defendant said that he told officers that he did not know who had driven his truck.

The Defendant said that he purchased the brass knuckles from someone at the bar for two dollars. He did not recall who that individual was, and he told officers that he did not know that they were illegal. The Defendant said he refused to take a breathalyzer test because he was not driving the truck. The Defendant said that the officers lied about what occurred that evening.

Based upon this evidence, the trial court found the Defendant guilty of Driving Under the Influence ("DUI"), third offense; possession of a prohibited weapon; and driving on a revoked license.

B. Sentencing Hearing

At the sentencing hearing, Adam Wicker testified about the presentence investigation of the Defendant. Wicker testified that the Defendant had been drawing disability income since 1991. Wicker said the Defendant had previous convictions including: two DUI convictions; multiple worthless check convictions; a public intoxication conviction; and a solicitation of a false police report conviction. Wicker said his agency recommended that the Defendant serve

the minimum jail sentence, pay all fines, and be placed on supervised probation that included random drug testing.

The trial court found:

> All right, [Defendant], in October of '97 you were convicted of a second offense DUI. That's the first entry that we have here in the pre-sentence report. Not a first offense, but a second.
>
> I'm taking into account that you served forty five days on that particular time, you lost your license for two years, you had an eleven month twenty nine day sentence, but there was forty five days which you served back in October of '97 or sometime shortly after that because of your conviction for a second offense. That was way back in '97, that's ten years ago and the court recognizes that. But it is the offense that causes this to be a third offense DUI[.]
>
> And so the [S]tate is asking that you serve your entire eleven twenty nine based upon this history that you have. But you have an understanding, [Defendant], that as a third offense you have to serve at least one hundred and twenty days of consecutive time as a third offense, there's not an option here. But you are going to serve at least one hundred and twenty days. That's our starting point. That's the starting point, [Defendant,] that's not the ending point, that's the starting point.
>
> If it was just a third offense DUI it would make some difference to the court and give us some reason just to say that's fine. But it's not because it's probably a fourth offense, but I'm not going to take that into account. I just want you to know that there had to be another offense prior to 1997 because you pled to a second. So it's possible that what we actually have here is a fourth offense and I just want you to know that the court recognizes that.
>
> . . . .
>
> In January of '99 then you have seven counts of worthless checks and you get an eleven month twenty nine day supervised probation. That probation comes in February of 2000.
>
> You had another DUI case where you're sentenced to a third offense in Davidson County on September of '99 and that particular offense took place also in September of '99. So you had a worthless check case, you committed the offense in September of '99, the 15th, and then September the 17th you get a charge of DUI third offense. You pled guilty, you served a hundred and twenty days, so you ought to know that when you get a third offense DUI you serve a hundred and twenty days at least. And so you pled guilty and that's how you got that particular sentence with a three year loss of your license.

September the 16th of '99 there's some other bad checks.

We go on to December 30th of 2000, we have some worthless checks. That's, the offense date is December 30th of 2000, not September of '99, but December of 200[0], we've got more worthless checks, you plead guilty to them in August of 2001. You're given a probated sentence. That's the fifth entry that we have here and that sentence is given to you in August of 2001.

In March of 2002 you have a public intoxication. You were on probation at the time that you got your public intoxication. You were on probation at sometime when you get your worthless checks. So you've got a public intoxication and that's the sixth entry that we have here.

In January of 2006 solicitation of a false police report, you pled guilty to that after this case came. This case comes the 3rd of September of 2005. Well, January 13, excuse me, January 10th of 2006 in White County you're charged with solicitation of a false police report and you plead guilty to it three days later and you take another eleven month and twenty nine day supervised probation.

So the probation department for PSI has put together a report for me and other than the other offenses that we know about that make this a third offense you have five other entries and you have a number of times when you have been revoked on probation. That makes the court believe that you're not a good candidate for probation.

The court is working with three cases or three different counts here, one is the DUI third offense, the other is driving on a revoked license, and the other is possession of a prohibited weapon.

It is the judgment of the court that you'll receive an eleven twenty nine sentence for the third offense DUI; you'll receive a six month sentence for the driving on a revoked license; and you'll receive an eleven month twenty nine sentence on the possession of a prohibited weapon. The driving on a revoked license, the days to serve will be sixty days. The possession of a prohibited weapon, the days to serve will be sixty days. These two [terms] to serve will run concurrently with what you'll serve on the DUI third offense and that is an eleven month twenty nine day sentence that you'll serve.

. . . [I]t is a seventy five percent sentence and it's possible that after serving nine months of your sentence that you're able to come out.

It is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends: (1) the evidence is insufficient to sustain his DUI conviction; and (2) the trial court erred when sentencing him.

A. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to sustain his conviction for DUI. He seemingly argues that there is insufficient proof that the Defendant drove the truck because he was not in it at the time that police arrived and because two witnesses testified that they saw a blonde woman driving the truck when it left the County Line Bar.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden

of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

A conviction for DUI requires a "person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state . . . while: (1) under the influence of any intoxicant . . . " T.C.A. § 55-10-401(a)(1) (2005). No blood alcohol test need be administered for a conviction of driving under the influence. *State v. Gilbert*, 751 S.W.2d 454, 459 (Tenn. Crim. App. 1988).

The evidence in this case, viewed in the light most favorable to the State, proved that the Defendant left the County Line Bar after drinking. He told two officers that he was driving his cousin, Ralph Spivey, home because Ralph had consumed too much to drink. Based upon this information, one officer asked the Defendant to perform several field sobriety tasks, and the Defendant did poorly at each task. The Defendant admitted that he failed the field sobriety tasks but claimed that he was not coordinated and could not perform the tasks even when sober. At trial, the Defendant claimed that he did not drive the truck, and he did not know who did. The trial court, as the trier of fact, discredited this testimony in favor of the testimony of the two police officers. This Court may not substitute its inferences for those drawn by the trier of fact from the evidence. *Buggs*, 995 S.W.2d at 105. Accordingly, there was sufficient evidence to support the Defendant's conviction, and he is not entitled to relief on this issue.

B. Sentencing

The Defendant next contends that the trial court imposed upon him too harsh a sentence when it ordered him to serve his entire sentence of entire eleven months and twenty-nine days in jail.[1] When a defendant challenges the length and manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ross,* 49 S.W.3d 833, 847 (Tenn. 2001); *State v. Pettus,* 986 S.W.2d 540, 543 (Tenn. 1999); *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean,* 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler,* 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith* 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements

[1]The Defendant does not appeal his sentences for driving on a revoked license and possession of a prohibited weapon, both of which are to run concurrently to his DUI sentence.

made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (1997 & Supp. 2002); *State v. Taylor,* 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2003), Sentencing Comm'n Cmts.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides, in part, that the trial court shall impose a specific sentence that is consistent with the purposes and principles of the 1989 Sentencing Reform Act. *See* T.C.A. § 40-35-302(b) (2006). A separate sentencing hearing is not required in misdemeanor sentencing, but the trial court must "allow the parties a reasonable opportunity to be heard on the question of the length of any sentence and the manner in which the sentence is to be served." T.C.A. § 40-35-302(a). A misdemeanor sentence, unlike a felony sentence, has no sentence range. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

The trial court is allowed greater flexibility in setting misdemeanor sentences than felony sentences. *State v. Johnson,* 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). The trial court should consider enhancement and mitigating factors in making its sentencing determinations; however, unlike the felony sentencing statute, which requires the trial court to place its findings on the record, the misdemeanor sentencing statute "merely requires the trial judge to consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement." *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). The misdemeanor offender must be sentenced to an authorized determinate sentence with a percentage of not greater than seventy-five percent to be served by the defendant before he or she is eligible for rehabilitative programs. T.C.A. § 40-35-302(d). When a defendant challenges a misdemeanor sentence, this Court conducts a de novo review with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d).

The Defendant was convicted of DUI, third offense, a class A misdemeanor, which carries a sentence not greater than eleven months and twenty nine days in jail. T.C.A. § 40-35-111(e)(1) (2006). Our legislature has provided that a defendant convicted of third offense DUI "shall be confined in the county jail or workhouse for not less than one hundred twenty (120) days nor more than eleven (11) months and twenty-nine (29) days . . . ." T.C.A. § 55-10-403(a)(1) (2006). In effect, the DUI statute mandates a minimum sentence for a DUI conviction, with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended. *State v. Combs*, 945 S.W.2d 770, 774 (Tenn. Crim. App. 1996). "[A] DUI offender can be sentenced to serve the entire eleven month and twenty-nine day sentence imposed as the maximum punishment for DUI so long as the imposition of that sentence is in accordance with the principles and purposes of the Criminal Sentencing Reform Act of 1989." *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995).

The Defendant contends that the trial court erred when it ordered him to serve his sentence in jail. The trial court first noted that the Defendant had previously pled guilty to DUI, third offense, and served 120 days in jail, meaning there was a possibility that this was a fourth

offense DUI. The trial court then noted the Defendant's extensive criminal record, with multiple convictions for worthless checks, public intoxication, and solicitation of a false police report. The trial court expressed concern that many of the Defendant's convictions came while he was on probation or bond and that the Defendant's probation had been revoked on several occasions. The trial court, therefore, found that the Defendant was not a good candidate for probation. The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of term to be imposed. T.C.A. § 40-35-103(5). The trial court correctly noted that the Defendant's criminal history shows that he is not a good candidate for probation. We conclude that the sentence imposed by the trial court is neither excessive nor inconsistent with sentencing principles, and we perceive no error in the trial court's ordering the Defendant to serve his sentence in jail. Accordingly, the Defendant's sentence is affirmed.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court in all respects.

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ROBERT W. WEDEMEYER, JUDGE